

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6101
~~73-2461~~

To be argued by
EDWARD M. KATZ

In The
United States Court of Appeals
For The Second Circuit

HERMAN DUARTE,

Plaintiff-Appellant.

vs.

UNITED STATES OF AMERICA and UNITED STATES
COAST GUARD,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

	Page
Issues Presented for Review	1
Statement of the Case	2
Proceedings in the Court Below	2
Statement of Facts	3
Argument	9
The District Court has jurisdiction to award monetary damages for the taking of plaintiff's merchant mariner's document without due process of law as required by the Fifth Amendment to the United States Constitution	
Argument	11
The good faith <u>vel non</u> of Commander Newman and Chief Petty Officer Cooper is irrelevant and therefore does not constitute a defense to an award of monetary damages	
Conclusion	21

TABLE OF CASES CITED

	Page
American Oil Co. v. United States 383 F. Supp. 1281 (N.D. Okla. 1974)	10, 21
Bivens v. United States 403 U.S. 388 (1971)	10
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1348 (2d Cir. 1972)	8, 12, 13, 14, 15, 16, 17
Galella v. Onassis, 487 F. 2d 986, 993 (2d Cir. 1973)	15
Jaekel v. United States, 304 F. Supp. 993 (S.D.N.Y. 1969)	10, 18, 19
Lowther v. United States, 480 F. 2d 1031 (10th Cir. 1973)	10
Menkarell v. Bureau of Narcotics, 463 F. 2d 88 (3d Cir. 1972)	10
Pasha v. United States, 484 F. 2d 630 (7th Cir. 1973)	10
Simons v. United States, 497 F. 2d 1046 (9th Cir. 1974)	10
Smith v. United States, 458 F. 2d 31 (9th Cir. 1972)	10, 20
United States v. One 1965 Chevrolet Impala Convertible, 475 F. 2d 882 (6th Cir. 1973)	10

STATUTES AND AUTHORITIES CITED

	Page
28 U.S.C. §1346(a)(2)	9, 10, 11, 19
46 U.S.C. §239	4
46 C.F.R. §137.05-15(a)(5)	5
46 C.F.R. §137.10-10(a)-(c)	5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERMAN DUARTE,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,

Defendants-Appellees.

BRIEF ON BEHALF OF APPELLANT

Issues Presented for Review

- I. Should Not This Court Hold that Monetary Damages Lie for Violation of a Fifth Amendment Due Process Right and, Therefore, Remand This Action for Trial on the Amount of Damages Only?
- II. Was it Not Error for the District Court to Dismiss the Amended Complaint When It Found That Plaintiff Was Denied the Due Process of Law Required by the Fifth Amendment to the United States Constitution Since Good Faith of the Local United States Coast Guard Officials is Irrelevant?

Statement of the Case

A. Proceedings in the Court Below

This is an appeal by the plaintiff-appellant, Herman Duarte, from a judgment of the United States District Court for the Southern District of New York, Charles S. Stewart, J. entered on June 30, 1975 in favor of defendants-appellees, United States of America and United States Coast Guard, dismissing the amended complaint upon motions brought pursuant to Rules 56 and 12(c) of the Federal Rules of Civil Procedure. (60A) Plaintiff's motion to reconsider this dismissal was granted but the original decision was adhered to on September 9, 1975 (61A) and a Notice of Appeal was docketed on October 8, 1975. (62A)

Neither the original opinion nor the endorsed memorandum adhering to this decision has yet been officially reported.

* All page references in the text are to the Joint Appendix unless otherwise indicated.

B. Statement of Facts

This action by a merchant seaman originally sought injunctive relief requiring the return of plaintiff's merchant mariner's document and monetary damages based upon an alleged wrongful withholding of same. During the pendency of this lawsuit and after both sides submitted motions for summary judgment with supporting affidavits injunctive relief was mooted when the defendants issued plaintiff a new merchant mariner's document. (48A) This was accomplished without prejudice to their contention that he was not legally entitled to it. Plaintiff reserved his right to pursue his claim for damages.

As amended the complaint seeks monetary damages for the wrongful withholding of plaintiff's merchant mariner's document from October 14, 1972 to December 23, 1974. The absence of this document effectively precluded him from earning a living at sea. The jurisdiction of the District Court is founded upon 28 U.S.C. §1346(a)(2) and the Fifth Amendment to the Constitution of the United States. (45-47A)

In October 1972 plaintiff was employed aboard the S.S. "American Challenger" which was

anchored off Qui Nhon, Republic of South Vietnam. On October 5 he was arrested ashore by the local constabulary on charges of possession of four marijuana cigarettes and for currency violations. Plaintiff was confined to jail from that date until October 13, 1972 when he was released and returned to his vessel. During the eight day period of confinement he communicated with no one who spoke English except for a United States State Department representative shortly after his arrest. (39-40A) Plaintiff believed that the charges against him had been dropped but was later advised that he would have to go ashore to face trial in a South Vietnamese Court on October 18, 1972. (40A) On October 14, 1972 while plaintiff was ashore awaiting trial he was approached by Commander Darwin W. Newman of the United States Coast Guard who obtained his signature upon a "Voluntary Surrender Agreement." (27-28A, 40-41A) In executing this agreement plaintiff relinquished his right to his Merchant Mariner's Document in exchange for not having to answer misconduct charges at an administrative hearing pursuant to 46 U.S.C. §239. (28A) Plaintiff requested that the Commandant of the Coast Guard return his document because he was denied due process (22-23A) and instituted this action upon rejection of

of this request (25-26A).

The regulations pursuant to which Commander Newman acted in seeking and obtaining acceptance of a "voluntary surrender agreement" provide as follows:

"The investigating officer may accept the voluntary surrender of a ... document when the person under investigation desires to avoid a hearing." 46 C.F.R. §137.05-15(a) (5)

"(c) Any person may surrender his... document to an investigating officer in preference to appearing at a hearing.

(b) Whenever a person voluntarily surrenders his ... document he shall sign a written statement containing the following stipulations that:

(b) (1) This surrender is made voluntarily in preference to appearing at a hearing;

(b) (2) All title to the... document surrendered is permanently relinquished;

(b) (3) His rights with respect to a hearing, appeal and review are waived.

(c) A voluntary surrender of a ... document to an investigating officer in preference to appearing at a hearing should not be accepted by an investigating officer unless the investigating officer is convinced that the seaman fully realizes the effect of such surrender." 46 C.F.R. §137.10-10(a)-(c)

The district court held that plaintiff was not accorded due process. Specifically he did not have the advice of counsel nor was he advised of his rights to and the possible consequences of a due process hearing. He was not shown a copy of the charges nor was he informed of the time or place for the hearing. Mr. Duarte was also not advised that he would be entitled to counsel at the hearing or that the administrative law judge would not be required to revoke his document even if the charge of possession were found proved (53-55A, 57A).¹ The district court's findings on these points are as follows:

"First, Duarte never had advice of counsel even for the charges lodged against him by the South Vietnamese government and was far away from home among non-English speaking people where he was less likely to obtain any advice. Second, his alternative to signing the document surrendering his license, that is, the rights attendant to and possible consequences of a due process hearing were not made sufficiently clear to him. It is true that Duarte was informed that, at some unspecified time and place, he

1. See footnote 3 to the Opinion of the district court (54A).

would be entitled to a hearing on his alleged misconduct. It does not appear, however, that he was shown a copy of the charges or informed of the time or place for the hearing....Finally, Duarte was not informed that he would be entitled to counsel at that hearing or that the hearing officer would not be required to deprive plaintiff of his license even if he found that plaintiff had marijuana in his possession."

....

"In addition to failing to inform plaintiff that he would be entitled to counsel if he should wish a hearing on the charges, the government did not inform plaintiff that the hearing officer could give Duarte a penalty less than document revocation even if he found that Duarte had marijuana in his possession as charged. It seems to us particularly relevant to a determination to waive a right that the party considering such a waiver know what the right entails and the possible consequences of exercising that right."
(54-55A) (Footnote omitted)

Having so held the district court did not consider the constitutional adequacy of the regulations pursuant to which Commander Newman acted in obtaining a voluntary surrendering plaintiff's document. The affidavit of Commander Newman (27-28A) attests to the fact that he adhered dutifully to the regulations

which, at least on their face did not require that he accord plaintiff the due process rights to which Judge Stewart held him entitled.

Notwithstanding the finding that plaintiff was denied due process of law the district court felt constrained by this Court's decision on remand in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1348 (2d Cir. 1972) to deny monetary damages because plaintiff did not contest the good faith belief of Commander Newman and Chief Petty Officer Cooper in the propriety of their actions in seeking and obtaining plaintiff's signature upon a Voluntary Surrender Agreement. (58-59A) The judge also declined to decide the question of whether monetary damages will lie for a violation of a Fifth Amendment right. For the reasons set forth hereinafter plaintiff believes that monetary damages are recoverable for violation of a Fifth Amendment right and that in this action the good faith of Commander Newman and Chief Petty Officer Cooper does not constitute a defense to the claim for monetary damages. (57-58A)

ARGUMENT

The District Court. Has Jurisdiction to Award Monetary Damages for the Taking of Plaintiff's Merchant Mariner's Document Without Due Process of Law as Required by the Fifth Amendment to the United States Constitution.

The amended complaint sought damages in the amount of \$9,500.00 for the loss of wages sustained by plaintiff due to the alleged wrongful taking and retention of his merchant mariner's document. 28 U.S.C. §1346(a)(2) grants jurisdiction to the United States District Courts concurrent with the United States Court of Claims to hear and determine controversies founded upon the Constitution where the amount in controversy does not exceed Ten Thousand Dollars.

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of:

....

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding

in tort." 28 U.S.C. §1346(a)(2)

The district court found that there was a Fifth Amendment denial of due process to plaintiff in the taking of his merchant mariner's document. Therefore, it is clear that jurisdiction existed pursuant to 28 U.S.C. §1346(a)(2) for an award of damages¹ unless, as the district court found, the good faith of the Coast Guard officials is sufficient to deny recovery.

1. Simons v. United States, 497 F. 2d 1046 (9th Cir. 1974); Pasha v. United States, 484 F. 2d 630 (7th Cir. 1973); Lowher v. United States, 480 F. 2d 1031 (10th Cir. 1973); United States v. One 1965 Chevrolet Impala Convertible, 475 F. 2d 882 (6th Cir. 1973); Menkarell v. Bureau of Narcotics, 463 F. 2d 88 (3d Cir. 1972); Smith v. United States, 458 F. 2d 31 (9th Cir. 1972); American Oil Co. v. United States, 383 F. Supp. 1281 (N.D. Okla. 1974); Jaekel v. United States, 304 F. Supp. 993 (S.D.N.Y. 1969). Since the amount in controversy in this case does not exceed \$10,000 there is no necessity for an analysis such as was done in Bivens v. United States, 403 U.S. 388 (1971). In that case the suit sought damages in the amount of \$15,000 and the Supreme Court found that the district courts had authority to award damages pursuant to the Fourth Amendment to the Constitution without reference to a specific grant of jurisdiction.

ARGUMENT

The Good Faith vel non of Commander Newman and Chief Petty Officer Cooper is Irrelevant and Therefore Does Not Constitute a Defense to an Award of Monetary Damages.

The district court first decided that plaintiff was denied the due process of law required by the Fifth Amendment since he was not made sufficiently aware of his rights to and at a hearing before he "voluntarily" surrendered his merchant mariner's document. The judge then determined that it was unnecessary to decide the issue of plaintiff's right to monetary damages for a Fifth Amendment violation² because of a defect fatal to plaintiff's action. That defect is plaintiff's failure to allege bad faith on the part of the defendants in

2. We believe that the court erred in this regard since 28 U.S.C. §1346(a)(2) provides sufficient authority for an award of damages. See the first argument, *supra*.

the face of affidavits of good faith by the two officers involved in obtaining the voluntary surrender.

"On remand in Bivens, the Second Circuit found that if a federal officer could show that he acted in good faith and with a reasonable belief in the validity of the arrest and search then he would have a valid defense to a suit for damages. Bivens v. Six Named Unknown Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339 1348 (2d Cir. 1972).... Here, where plaintiff has failed to allege bad faith on the part of the defendants, and where affidavits of the two Coast Guard officers who were involved in obtaining 'voluntary surrender' attest to their good faith belief in the propriety and voluntariness of the surrender, we cannot say that defendants should be liable for monetary damages." (58-59A)

Appellant agrees that if good faith were a valid defense in this case then an award for damages could not here be sustained. However, good faith is totally irrelevant to the facts of this case and those courts allowing monetary damages for a denial of due process rights have not been concerned with good faith as a defense.

In Bivens, supra, this Court was presented with the problem of formulating "the standard which judges and juries are to apply in deciding the issue

of liability of such officers (police) to pay damages to an allegedly wronged plaintiff." Id. at 1341. An understanding of the facts of that case is crucial to an accurate application of the standard set forth therein and of its limitations.

Bivens was arrested and he and his apartment were searched by agents of the Federal Bureau of Narcotics acting under claim of federal authority for an alleged narcotics violation. He claimed to have been manacled in sight of his wife and children and had had his entire family threatened with arrest. He brought suit alleging that the actions of the police officials in arresting and searching him were conducted without a warrant; that unreasonable force was employed in making the arrest and that the arrest was made without probable cause. Id. at 1341-42.

The court held that a police officer will not be held liable for damages where he alleges and proves that he had a reasonably based good faith belief that his actions were lawful. The rationale for this holding

is clearly set forth in the opinion:

"[W]e must not be unmindful of the fact that these FBI and Narcotics Agents whose lives are in constant danger... perform functions indispensable to the preservation of our American way of life. They must not be left defenseless against the demands of every person who manages to escape from the toils of the criminal law...."

"At common law the police officer always had available to him the defense of good faith and probable cause, and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of the arrest or search...."
Id. at 1347

"Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection." Id. at 1347-1348.

Several distinctions between the factual situation of Bivens and the factual situation in this case are apparent.

The Bivens standard was founded upon a common law defense available specifically to a police officer and clearly applies only to those performing discretionary police functions, Galella v. Onassis, 487 F. 2d 986, 993 (2d Cir. 1973). The good faith defense has no applicablility to those not performing discretionary police functions. Since Commander Newman and Chief Petty Officer Cooper were not police officials they are not entitled to the good faith defense set forth in Bivens. In adhering to written regulations no true exercise of discretion was involved and this is a further reason why good faith should not be a defense here.

The rationale behind the Bivens standard does not admit of its application to this case. The Court in Bivens reasoned that a police officer who possesses a well founded good faith belief that his actions are lawful should not be deterred from further such actions to protect the public at large by an award of monetary

damages to anyone who "escapes from the toils of the criminal law." (Bivens, 456 F.2d at 1347). Even judges differ greatly in determining the probable cause necessary to sustain an arrest and search. "As he tries to find his way in this thicket the police officer must not be held to act at his peril." (Id. at 1348) No such reasoning is applicable to a Coast Guard official not acting as a police officer who correctly applies a given set of regulations.

A further important distinction between Bivens and this action compels the conclusion that a "good faith" defense should not be allowed here. In Bivens individual police officers were being sued for actions done in the course of an investigation and arrest. They allegedly abused their discretion - that is they committed an act of misjudgment. Their good faith should certainly be relevant on whether they should be made to respond in damages. In this case the United States Coast Guard and the United States of America, not individuals, are being sued for failing to accord plaintiff due process in violation of his Fifth Amendment rights. There is here no allegation

of an abuse of discretion on the part of Commander Newman and the Chief Petty Officer Cooper - that there is no allegation of any error in judgment. Due process of law is not a matter of discretion or judgment. This distinction between Bivens and Duarte is crucial for one may well ask rhetorically where does the good faith of anyone become relevant when there is a due process denial. The clear answer is that it is irrelevant. All the good faith in the world should not excuse such a denial unless one can find a countervailing public policy to support it. Such a policy was present in Bivens but is totally absent here.

The Bivens standard correctly applied tends to promote efficient law enforcement while adequately protecting the public by requiring a police officer to act upon a reasonably based good faith belief in the propriety of his action. Permitting the reasonably based good faith belief of Commander

Newman and Chief Petty Officer Cooper here to constitute a defense to this action against the government for a denial of due process to plaintiff would not serve to promote any valid governmental purpose. There is a vast difference between allowing a "good faith" defense to police officers to encourage them to use their discretion wisely in the public interest with respect to arrests and searches and permitting such a defense to encourage the official lawlessness involved here.

The cases awarding damages for Fifth Amendment due process violations have not considered "good faith" as a defense. In Jaeckel v. United States, 304 F.Supp.993 (S.D.N.Y.1969) plaintiff's daughter was arrested by Federal Narcotics agents for an alleged

violation of the Federal Narcotics laws and plaintiff's automobile was seized as permitted by law. Plaintiff was later advised of the arrest and seizure. Acting pursuant to official regulations the Bureau of Narcotics advertised the seizure of the automobile and stated that any person claiming an interest therein must file a claim within a specified period of time. No such claim was filed and the automobile was forfeited to the United States and thereafter seized. Plaintiff instituted an action seeking a declaration that the forfeiture was void and for money damages under 28 U.S.C. §1346(a)(2). She contended that notice by publication was constitutionally inadequate to provide her notice of the forfeiture. The court found that publication is not enough with respect to one whose name and address are known and whose legal interest in the property is directly affected by the forfeiture proceeding.

"Where the defendant had plaintiff's name and address and where giving personal notice of the forfeiture proceeding would have caused the defendants no additional inconvenience, the court finds that the notice to plaintiff was not sufficient and that the forfeiture proceeding was void as it deprived plaintiff of her property without due process of law required by the Fifth Amendment."
Id. at 999.

The court then awarded damages without reference to the good faith of those government officials who followed regulations in effecting the forfeiture.

Smith v. United States of America, 458 F.2d 1231 (9th Cir. 1972) was an action by a landlord against the United States to recover damages for the use of his warehouse. The Internal Revenue Service had issued a distraint order for unpaid taxes owing by plaintiff's lessee. Levy was made upon the lessee's equipment in Smith's building which was seized by padlocking the building and posting notices. Smith notified the government agents that the lessees were several months in arrears of rent and demanded that the defendant either vacate the premises or pay for its use. The government did neither. The Court of Appeals affirmed a district court decision that the government was liable for the fair rental value of the premises since they took property without due process of law. The good faith of the agents who seized the property pursuant to rules and regulations was not discussed. To the same effect see also the other cases cited in footnote number 1 to this brief.

Finally, in American Oil Co. v. United States, 383 F. Supp. 1281, (N.O. Okla. 1974) the plaintiff was allowed to recover rents on its property and profits on its tires which would have been sold during the period that the government unlawfully held plaintiff's property after levying and seizing its gas station operated by plaintiff's lessee. It is obvious that the profits of a business are the equivalent of the wages of a worker. If one is recoverable then the other certainly is too.

It is apparent, for the reasons set forth above, that good faith is not available as a defense in this action and that those courts awarding monetary damages for due process violations have not considered good faith as a defense.

CONCLUSION

For the reasons set forth above it is respectfully requested that this Court reverse the decision of the district court to the extent that it denied plaintiff a recovery of his loss of wages and remand this action for a trial on the amount of damages only.

OF COUNSEL

EDWARD M. KATZ, ESQ.

Respectfully submitted,

ABRAHAM E. FREEDMAN



**UNITED STATES COURT OF APPEALS
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HERMAN DUARTE,

Plaintiff-Appellant,

- against -

**UNITED STATES OF AMERICA and THE UNITED
STATES COAST GUARD,**

Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Eugene L. St. Louis
depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane Street, Union, N.J. 07083
That on the 10th day of December 19 75, deponent served the annexed *Brin* ⁽²⁾

upon John M. Rogers

attorney(s) for

Defendants-Appellees in this action, at

Appellate Section, Civil Division, Room 3643
U.S. Department of Justice
Washington, D.C. 20530

the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
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Sworn to before me, this 10th
day of December 19 75

Robert T. Brin

Eugene L. St. Louis
Print name beneath signature
EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977